IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 116 OF 2016
[High Court Civil Action No. HBC 204 of 2004]

BETWEEN : **GAYA PRASAD aka GAYA PRASAD CHOTU**

Appellant

AND : **ARON ADARSH JIVARATNAM**
PREMINA SINGH

Respondents

Coram : **Lecamwasam, JA**
Almeida-Guneratne, JA
Jameel, JA

Counsel : **Mr V Kumar for the Appellant**
Mr S Singh for the Respondents

Date of Hearing: **5 February 2020**

Date of Judgment: **28 February 2020**

JUDGMENT

Lecamwasam, JA

[1] This is an appeal filed by the appellant against the judgments of the High Court of Suva exercising its appellate jurisdiction and that of the Master. Facts in brief are that: the

Respondent (the Plaintiff in the original case) entered into a sale and purchase agreement with the Appellant (Defendant in the original case) for the sale of the Appellant's land titled CT 8413, Lot 3 on DP 1995 Viti Levu containing in extent 1 rood and 11.3 perches. This sale and purchase agreement was entered into between the parties on the 22nd of April 2014 for a consideration of $360,000.00. As per the agreement, the parties have *inter-alia* agreed the sum of $360,000.00 is o be paid within 60 days of entering into the agreement subject to the other terms of the agreement.

[2] As this is a matter which originated from an order of the Master followed by an order of the High Court Judge sitting in appeal, the question whether the matter is interlocutory or otherwise was raised by the parties. The original Plaintiff (Respondent) argued that this matter is interlocutory in nature which therefore requires the leave of court. The Plaintiff further argued that the appellant can invoke the jurisdiction of this court in relation to an interlocutory order only on a question of law. Conversely, the Appellant argued that this is not an interlocutory order and hence does not require the leave of Court. The Respondent has addressed this Court on the issue of the interlocutory nature of the matter at length. The Respondent insists that leave to appeal is a preliminary requirement upon which invoking the jurisdiction of this court rests. In the absence of any attempt to seek leave to appeal, the original plaintiff urged court to dismiss the appeal.

[3] The Respondent filed the writ of summons together with the statement of claim seeking the following orders:

> *"A. Specific Performance of a written agreement between the Plaintiffs and the Defendant made on 22 April 2014, for the sale by the Defendant to the Plaintiffs of the Defendant's freehold property comprised and described in Certificate of Title No.8413 being Lot 3 on DP No.1995.*
>
> *B. Further or alternatively, an injunction restraining the Defendant whether by his servants, agents or howsoever from dealing with the property comprised and described in Certificate of Title No.8413 being Lot 3 on DP No. 1995 until further orders of this Court.*
>
> *C. Further or alternatively, damages for breach of contract.*

D. Such further or order relief as to this Honourable Court seems fit and proper.

E. Costs of and incidental to this action."

[4] Upon perusal of the relief pleaded above, it is apparent that if this Court makes a finding in favour of the Respondent under relief "A" i.e. of specific performance, the matter comes to an end.

[5] On this, I have appropriately given my mind to the seminal cases of **White v Brunton** [1984] 2 All ER, **Suresh Charan v Shah** (1995) 41 FLR 65, and **Goundar v Minister of Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008). The latter judgment has decided with finality the position of the Fiji Courts in relation to the approach to be adopted in matters of this nature i.e. to adopt the '*application approach*'. The test here is to determine the type of order i.e. whether an order is interlocutory or final premised on the nature of the application rather than the nature of the order itself. I have no doubt in my mind that the impugned ruling/order of the learned Master was a final order or judgment.

[6] After the learned Master made the impugned order/ruling in regard to the declaration seeking specific performance, there was **nothing left** in the suit for the parties to proceed within the framework of that suit.

[7] If specific performance was granted, that being the final relief sought by the Plaintiff in the original writ of summons, the litigation comes to an end, subject to an appeal. On the other side of the coin, if that relief was to be refused, such refusal stood as the final relief the Defendant had agitated for, again subject to an appeal.

[8] As I have already stated, the order for specific performance was sought by the Plaintiff by his writ of summons and the statement of claim filed on 13 October 2014. As per paragraph 6 of the above statement of claim:

"6. On 9 June 2014, a copy of the stamped Transfer was forwarded to the Defendants solicitors, Messrs. Reddy Nandan Lawyers for the

Defendant to complete his obligations under the Capital Gains Tax Decree 2011 and to advise the Plaintiffs when he was ready to complete the sale of the said property."

[9] Hence, the claim for specific performance apparently stems from the failure of the Defendant to obtain the capital gains tax clearance certificate which played a vital role in the proceedings. The Plaintiff took up the position that such failure of the Defendant resulted in the breakdown of the agreement. However, the email dated 30 June 2014 (at page 334 of the volume) evidences that the Defendant was willing to return to Fiji to attend to the formalities of and to obtain the CGT clearance certificate. Despite such communication, the Defendant had not obtained the tax clearance certificate up to the time of filing the action before the Master.

[10] In his written submissions and at the time of argument, the appellant took up the position that the failure to complete the settlement was due to the non-payment of a deposit. He viewed as unreasonable, the request of the Plaintiff for completion of settlement without having made the requisite deposit. In response, the Plaintiff takes up the position that the failure of the Defendant to fulfill his obligation in obtaining a tax clearance certificate was the reason for the whole settlement process to come to a standstill.

[11] Having considered the nature and circumstances of this case, I find that the order of the Learned Master compelling *"specific performance*" brought the whole matter to an end. Thus, looking at the matter from the perspective of both parties, the effect of the impugned order of the learned Master was to put an end to the litigation thereby constituting it to be final order or judgment within the meaning of those terms. Hence, I am more than satisfied that the matter before us is an appeal arising out of a final order made by the learned Master and thereafter by the learned High Court Judge. Section 12(2)(f) of the Court of Appeal Act requires leave to appeal only "from any interlocutory order or interlocutory judgment made or given by a judge of the High Court…".

[12] In view of the above findings, I hold that the matter at hand is not interlocutory in nature and therefore the leave of Court is not necessary. The Appellant has the right to come

before this Court even in the absence of having raised the matter as a question of law. Therefore, I am satisfied that this Court possesses jurisdiction to deal with this case.

[13] I will now deal with the facts of the matter. The Appellant filed this appeal against the orders of both the High Court Judge and the Master on the following grounds of appeal:

> *"**1. THAT** the Learned Appellate High Court Judge erred in law in not evaluating the evidence of the Appellant that the honorable Master has erred in law in making specific performance Order when the requirement of specific performance were not met, when the Respondent seeking equity relief did not do equity himself, hence there has been a substantial miscarriage of justice;*
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> ***2. THAT** the Learned Appellate High Court Judge and Master has erred in law in accepting that the service of Writ of Summon was proper despite having pointed out irregularities in service and the service done at wrong addresses and in dodgy and Dubious means hence there has been a substantial miscarriage of justice as stated in the case of **ABDUL KADEER KUDDUS HUSSAIN CIVIL NO. ABU 0060 OF 1998** setting aside Order of Kepa J of 28th October 1993; applied **CRAIG v KANSEEN [1943] 1ALL ER 108, UDAY SINGH v DENIESHWAR RAO [2011] HBA 20/1011** ON THE 24TH October, 2011 per Y Fernando J at P9; orders were set aside;*
>
> *3**. THAT** the Learned Appellate High Court Judge erred in law in saying that "If **the order is seen to be clearly wrong,** this is not sufficient. It must be shown, in addition to the effect a substantial injustice by its operation ……" **in this** case the Appellants property would be transferred without payment of any consideration, hence there has been a substantial miscarriage of justice when such orders ought to be set aside as of right since it was a default Judgment was obtained on **Ex-parte Notice of Motion** pursuant to **Order 13 Rule 6 and Order 19 Rule 7 of the High Court Rules 1988**.*
>
> ***4. THAT** the Learned Appellate High Court Judge erred in law in applying wrong test of setting aside of a default judgment only requires an explanation of why he could not file his statement of defence, and serve and whether he had an arguable Statement of Defence and he is not required to show whether issue raised is **one of general importance***

or whether it simply upon facts of the particular case hence there has been a substantial miscarriage of justice.

5. ***THAT*** *the Learned Appellate High Court Judge and Master have erred in law in* ***not*** *coming to the conclusion that the delay by the Respondent in fulfillment to act* ***within the time frame set by the Sale and Purchase Agreement*** *amounted to laches and as such* ***equitable*** *relief of specific performance is not available hence there has been a substantial miscarriage of justice;*

6. ***THAT*** *the Learned Appellate High Court Judge and Master have erred in law and in fact in not coming to the conclusion that the Appellant was denied* ***Rules and Natural Justice*** *when* ***learned Master took*** *evidence of Respondent behind the back* ***of Appellant****; hence there has been a miscarriage of justice see* ***Criminal Appeal No HAA003/2011 Farzan Investments Limited v Suva City Council****;*

7. ***THAT*** *the Learned Appellate High Court Judge and Master have erred in law in* ***not*** *giving any weight to the affidavit evidence tendered by the Appellant which* ***could not be*** *determined as to the truth in summary manner of the Appellant running around for his money, hence there has been a substantial miscarriage of justice;*

8. ***THAT*** *the Learned Appellate High Court Judge and Master have erred in law in not finding that the* ***Sale and Purchase Agreement*** *was* ***expired and defective and had*** *no effect of altering substantive rights of the Appellant without payment of consideration (See paragraph 18 of his Lordships Judgment* ***"$360.00 shall be paid within 60 days of the agreement"*** *which was not done, see page 1 of Sale and Purchase Agreement number* ***10 heading: time, it says time is of essence money is still not paid or made available and the learned Appellate still did not allow the leave to Appeal****, hence there has been a substantial miscarriage of justice), the Master was bias in his judgment see paragraph 26 of his judgment and the order that was obtained does not refer to any affidavit and again see paragraphs 29 and 30 of Masters decision, where Master refers to incidents after judgment having been already entered and the High Court Appellate Judge was bias in their decision on paragraphs 11, 12 and 13 of his judgment when the Appellant clearly points out that the service was done at wrong addresses by him providing addresses.*

9. ***THAT*** *the Learned Appellate High Court Judge erred in law and in fact by saying that as a general rule there is a strong presumption against granting of leave to appeal from interlocutory orders or judgment which do not either directly or by their practical effect finally determines any substantial rights of the Appellant* ***when to exercise unrestricted right of appeal against the Master decision, it is required by the Order 59 Rule 9 and 10 High Court Rules 1988 before any appeal is heard by the High Court Judge, leave to appeal must first be obtained****, hence there has been a substantial miscarriage of justice;*

10. ***THAT*** *the Learned Appellate High Court Judge and Master erred in law as their decision is unfair and unreasonable in all the circumstances and his Lordship failed to consider that Masters Orders amounts* ***arbitrarily acquiring of the property*** *without payment of* ***any*** *consideration which is* ***against the Fijian constitution section 27*** *hence there has been a substantial miscarriage of justice;*

11. ***THAT*** *the Learned Judge erred in law in awarding far excessive amount of cost as there was erred o law being pointed out hence there has been a substantial miscarriage of justice."*

[14] I advert my attention to the foundation on which the whole transaction rests i.e. the sale and purchase agreement. The Agreement states: *"the sum of $360,000.00 shall be paid within 60 days of this Agreement ("the Date of Settlement") subject to the terms of this agreement."* In view of this provision, it is clear that the date of settlement had to be within 60 days of the agreement i.e. before 22 June 2014. Evidence however shows that the settlement could not be reached due to the fault of both parties.

[15] In view of the positions taken by parties as reasons for the failure of the settlement of the Agreement i.e. the Plaintiff, that it was the failure of the defendant to obtain the CGT clearance certificate and the defendant, that it was for want of the deposit by the Plaintiff, it is pertinent to scrutinize the provisions contained in the sale and purchase agreement. While the entry under 'deposit' in the clause on **principal terms** states '*nil*' the entry under **1.3 general conditions** reads "*deposit shall be paid on signing of this agreement***".** Clause 1.3 is crystal clear that the deposit is a mandatory requirement. The evidence before me does not disclose the payment of any deposit by the plaintiff. This provision

has been overlooked by the learned Master as well as the learned High Court Judge. The learned High Court Judge in his judgment at paragraph 17 states: *"on a perusal of the Sale and Purchase Agreement, I find that there was no requirement for a deposit to be made."* I cannot agree with this observation of the learned High Court Judge in view of 1.3 of the agreement. 1.3 unequivocally states that the deposit should be paid on the signing of the agreement, and the fact that no deposit had been paid is clear on a perusal of the principal terms of the Agreement.

[16] If clause 3.1 was not meant to be operative, it should have been deleted by the parties. There is no evidence to show why it was left included. Thus the reasonable conclusion is that clause 1.3 was meant to be complied with by the parties.

[17] In addition, as mentioned above, the consideration was to be paid within 60 days of the agreement the last day of which fell on 22 June 2014. The defendant states that he signed the Agreement with the expectation of receiving the deposit upon execution of the instrument. His lawyers too have confirmed this to him. Therefore, even though the plaintiff went before the Master on the basis that the defendant is at fault for not obtaining the GCT, the plaintiff too is not sans fault. The learned Judges had not adverted their attention to this salient fact of the Plaintiff's lapse in paying the deposit. This is clearly seen in the Affidavit tendered by the appellant. Paragraphs 13 – 16 of Gaya's Prasad affidavit (page 168 of the volume) says thus:

> *"**13. THAT** since I was uneducated I had full and utter complete faith in my Solicitor at that time Reddy Nandan Lawyers.*
>
> ***14. THAT** I was informed by my Solicitor that the period for the Sale and Purchase agreement is of 60 days and upon signing of the agreement I would be paid a deposit of 10% of the sale price which is FJD$36,000.00 (thirty six thousand dollars) as this was customary.*
>
> ***15. THAT** pursuant to that I was also advised to sign the Transfer Document dated 25th of April 2014. Annexed is a copy of said Transfer marked as annexure "GPC 4" for your reference.*
>
> ***16. THAT** upon signing of the same I had neither received any money nor did my Solicitor at that time."*

They have only accepted the version of the plaintiff and held with the plaintiff.

[18] The issuance of an order of specific performance should not be done in a perfunctory manner nor should it be issued lightly. The learned Master, in the matter at hand, had acted merely on the facts placed before him by the plaintiff and issued the order of specific performance. The learned Master had not attempted to investigate the veracity of the facts nor whether the plaintiff had performed his obligations before moving for an order of specific performance. It was incumbent for the learned Master to have gone into the matter and satisfied himself that the plaintiff had in fact fulfilled his obligations under the Agreement, before issuing the order. The mere assertion that the plaintiff was "*ready and willing*" for the settlement itself is not adequate without further inquiry or corroborating evidence.

[19] Certain conditions precedent are necessary to be satisfied by the plaintiff before performance can be claimed. Specific performance will not be granted except to a plaintiff who has performed his obligation under the contract *(Chitty 22nd edition 1457; Anson 22nd edition 515; and Cheshire & Fifoot 6th edition p.582).*

[20] The Agreement further states that the vendor *i.e.* the seller, undertakes to pay income tax, sales tax, capital gains tax etc. and to give possession of the property to the purchaser on the "**Date of Settlement**". As per clause 1.3 under General Conditions of the agreement, the parties have agreed that the deposit is to be paid upon the signing of the agreement. Under the contract it was obligatory for the plaintiff to pay the full amount of $360,000.00 within 60 days i.e. by 22 June 2014. Therefore it is evident that the plaintiffs themselves had not complied with the mandatory provisions of the agreement thus raising doubts regarding their *bona-fides*. They had no right to go before the Master and ask for an order of specific performance without first fulfilling their part of obligations. They had not in the least deposited the amount in the trust account of the lawyers, which would have signaled good faith. Therefore, I cannot be unmindful of the plaintiff's own failure in not paying the deposit as per clause 1.3 of the agreement under the general conditions or depositing the full amount of $360,000.00 before the settlement

date. If those steps had been taken, the plaintiff's would have had every right to go before the Master to seek an order of specific performance. It is only just that the person seeking justice comes with clean hands. I find that the learned Master had erred in issuing an order for specific performance on the mere request of the plaintiffs without probing the breaches on the part of the plaintiffs.

[21] Therefore, in view of the above position I hold that the issuance of a specific performance order itself is erroneous. I set aside the order of the Master dated 19 July 2016 and on the strength of such a finding, I also set aside the order of the learned High Court Judge dated 14 October 2016 as well.

[22] In view of the above position the issue of the non-service of summons recedes to the background and becomes redundant. However in passing I will briefly comment on the validity of the service of summons as parties have heavily relied on this issue. Though I have observed certain lapses or shortcomings in this regard, I do not intend to venture into a long analysis of that since I have already set aside the orders of the learned Master as well as the learned High Court Judge. I will deal with the lapses in the service of summons briefly:

1) Although the court ordered the publication in Fiji Times, as per paragraph 2 of the affidavit of Romil Prakash (page 478) I find that it had been published in the Fiji Sun paper and not in the Fiji Times, which amounts to non-compliance with the court order.
2) A reasonable doubt of tampering or meddling with the address of Pratima Devi's PO Box 3498 at pages 419 and 492 leads to the conclusion that the figure 3248 was obliterated and changed to read as 3498. At page 352 even the learned Master had used PO Box number 3248 as the defendant's address. Hence there is a reasonable doubt in the whole process of the service of summons. However, as I have not based my judgment on the service of summons, I will not comment any further.

[23] In view of the above reasoning, I answer the grounds of appeal cumulatively in favour of the appellant and set aside the impugned orders of both the learned High Court Judge and the learned Master.

Almeida Guneratne, JA

[24] I agree with the judgment, reason and orders proposed by his Lordship Justice Lecamwasam.

Jameel, JA

[25] I agree with the reasons, conclusions and proposed orders of Lecamwasam JA.

Orders of the Court:

1) *Appeal allowed.*

2) *Decision of the learned High Court Judge dated 14 October 2016 and the decision of the learned Master dated 19 July 2016 are set aside;*

3) *The Plaintiff/Respondent to pay $5000.00 costs to the Defendant/Appellant.*

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Almeida-Guneratne
JUSTICE OF APPEAL

Hon. Justice F Jameel
JUSTICE OF APPEAL